proceeds of which Newberry claims to have a lien by virtue of the said deed of trust, was not owned by Watts when the deed of trust was executed. That one-tenth interest was one-half of the undivided interest of William Mahone in the Nye Cove tract of land, and was purchased by Watts subsequently to the execution of the deed of trust at a judicial sale made in the cause of Straley and Others *v.* Newberry and Others.

While the undivided one-fifth interest purchased by Watts from French and Straley and the undivided one-tenth interest purchased by Watts at the sale made by the court are parts of the Nye Cove tract of land, they are wholly distinct interests. Conceding, as was stated in argument, and not denied (though that fact does not clearly appear by the record), that the said undivided fifth interest embraced in the deed of trust was subject to a lien for the purchase money due French and Straley, and that it was sold to satisfy that lien, so that it was wholly lost as a security for Newberry's debt, we know of no rule of law that would extend the lien of the deed of trust to another and wholly distinct interest in the land subsequently asquired by Watts. If the interest subsequently acquired by Watts had been a part of the interest conveyed by the deed of trust, although that instrument contained no warranty of title, it may be that under the decisions of Nye *v.* Lovitt, 92 Va. 710, 717, 24 S. E. 345; Reynolds *v.* Cook, 83 Va. 817, 3 S. E. 710, 5 Am. St. Rep. 317, Burtners *v.* Keran, 24 Grat. 42, and Doswell *v.* Buchanan, 3 Leigh, 365, 23 Am. Dec. 280, it would have inured to the benefit of the deed of trust creditor; but upon this question we express no opinion, as it is not involved in this case.

We are of opinion that the decree complained of should be affirmed, except in so far as it holds that the decedent's attorneys had a lien on the drafts in their hands for the payment of their fees, and in so far as it holds that H. Newberry was entitled to the proceeds of the sale of the decedent's one-tenth interest in the Nye Cove tract of land. As to those claims, the decree must be reversed and set aside.

BEALE, Mayor, *et al. v.* PANKEY.

(June 20, 1907.)

[57 S. E. 661.]

1. **Statutes—Amendment—Title.**—Act March 7, 1906 (Acts 1906, p. 90), entitled "An act to amend and re-enact an act entitled 'An act incorporating the town of Pamplin City, Virginia,' approved March 24, 1874, as amended by an act entitled 'An act to amend and re-enact the third section of an act incorporating Pamplin City,' approved

March 31, 1875," was in violation of Const. art. 4, § 52 [Va. Code 1904, p. ccxxi], declaring that no law shall be revived or amended by reference to its title alone, but that the act revived or section amended shall be re-enacted and published at length.

2. Municipal Corporations—Charter—Abandonment—Nonuser.—A municipal corporation created by legislative act does not cease to exist by the nonuser of its charter or a surrender of its franchise; the charter being subject to forfeiture only by the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, § 138.]

3. Same—Charters—Amendment.—Const. § 117, provides that each of the cities and towns of the state having a municipal charter at the adoption of the Constitution may retain it, except so far as it shall be repealed or amended by the General Assembly, provided that every such charter is amended so as to conform to the provisions, restrictions, limitations, and powers set forth in the Constitution. Section 1 of the schedule of the Constitution declares that the common and statute laws in force at the time the Constitution takes effect, so far as not repugnant thereto and not repealed thereby, shall remain in force until they expire by their own limitations or are altered or repealed by the General Assembly. Held, that Code 1904, c. 44, § 1021, requiring town elections to be held every two years, on the second Tuesday in June, for the selection of a mayor and six councilmen, etc., operates as an amendment to Acts 1874, p. 138, c. 127, incorporating the town of Pamplin City, as amended by Act March 31, 1875, providing that the officers of the town shall consist of five trustees, to hold office for a year from March 1, 1874, and until their successors are elected and qualified according to an election to be held on the first Tuesday in February, 1875, and biannually thereafter.

4. Same—Officers—Taxes—Power to Levy.—Where the original charter of a town provided that its trustees, elected as provided therein, were authorized to levy such taxes as were required, not exceeding a specified limit, was amended by Code 1904, § 1021, providing generally for the election of a mayor and councilmen of such cities, officers of the town subsequently elected under such section had power to levy taxes within the limit prescribed by the charter.

Appeal from Circuit Court, Appomattox County.

Bill by P. P. Pankey against R. W. Beale and others, as officers of the town of Pamplin City. From a decree in favor of complainant, defendants appeal. Reversed.

James H. Guthrie, for appellants.
W. C. Franklin, for appellee.

CARDWELL, J. The town of Pamplin City, Va., was incorporated by an act of the General Assembly approved March 24, 1874 (Acts 1874, p. 138, c. 127); the title of the act being "An act in-

corporating Pamplin City, Virginia." The first section of the act declares that the town of Pamplin, in the counties of Appomattox and Prince Edward, as the same had been theretofore laid off into lots, streets, etc., should be and was thereby made a town corporate, by the name of Pamplin City, and by that name to have and exercise the powers conferred upon towns by the general laws then in force, or which might thereafter be passed, for the government of towns containing less than 5,000 inhabitants. The second section set out and defined the boundaries of the town. The third section provided that the officers of the town should consist of five trustees, who were to compose the council, etc., and certain persons named were to constitute the board of trustees, to hold their office one year from the 1st of March, 1874, and until their successors were elected and duly qualified according to law, and that on the first Tuesday in February, 1875, there should be a regular election held for the election of officers of the corporation, and every two years thereafter. Said section further provided that the trustees should have power to pass all by-laws and ordinances for the government of the town that they might deem proper, not in conflict with the Constitution of this state or of the United States, and also to provide for keeping streets in order, opening new streets, etc., and for other necessary improvements, for which purpose they might levy such tax, not exceeding 50 cents on the $100 worth of property as they might deem proper, etc. The fourth section provided that the trustees should elect from their body a president, who should be the mayor of the town, and be vested with all the powers of a justice of the peace within the limits of the town, etc. The fifth and last section provided for the appointment by the councilmen of a town sergeant, and prescribed the duties and powers of that officer, among which was that he should collect all town taxes.

The trustees named in the charter duly qualified by taking the oath of office, respectively, as required by law, entered upon the duties of councilmen of the town, and continued to act as such until an election of there successors was held thereafter as provided by law. The councilmen chosen at the first and at subsequent elections entered upon the duties of councilmen and acted in that capacity for a number of years.

By an act approved March 31, 1875 (Acts 1874-75, p. 419, c. 330), the third section of the original act of incorporation was amended; but this amendment is of but little importance here, as it only changed the time for the election of the successors of the trustees named in the original act, so that the election should take place on the fourth Thursday in May, 1875, and every two years thereafter.

By an act approved March 7, 1906 (Acts 1906, p. 90), the General Assembly again undertook to amend the charter of the

town; the last-mentioned act being entitled "An act to amend and re-enact an act entitled 'An act incorporating the town of Pamplin City, Virginia,' approved March 24, 1874, as amended by an act entitled 'An act to amend and re-enact the third section of an act incorporating Pamplin City,' approved March 31, 1875." Among other things, this last-named act provided that from and after the act went into effect, and until its councilmen and mayor, to be elected under its provisions, should have been so elected and qualified, R. L. Franklin, C. S. Morton, F. H. Lukin, L. N. Ligon, J. F. Connally, and R. D. Baldwin were appointed councilmen, and R. W. Beale, mayor, how they might qualify, and that therefrom they should constitute the mayor and councilmen of said town of Pamplin City, Va., etc.

At an election held in the town of Pamplin City for mayor and six councilmen on the second Tuesday in June, 1906, in accordance with the general law then in force (section 1021, Code 1904), the said Beale was elected mayor and the other six persons above named were elected councilmen of the town, and they respectively qualified as such on the 23d day of June, 1906, and entered upon and continued to discharge the duties of their respective offices; the council electing one W. T. Johnson sergeant of the town, who duly qualified as such by taking the oaths prscribed by law, one of his duties prescribed by the ordinance passed by the council being to "collect all taxes." The council, at a meeting held on the 25th day of June, 1906, levied a tax of 25 cents upon the $100 worth of all property liable for taxation in the town, for the lawful purposes of the town. Among the persons against whom a tax was levied was one P. P. Pankey, for the sum of $1.97, an account for which was made out and placed in the hands of Johnson, sergeant, for collection, along with the accounts of other persons charged with taxes in the town. Johnson, the sergeant, proceeded to enforce the payment of the tax so levied, whereupon Pankey exhibited his bill against the mayor, councilmen and sergeant of the town, and obtained from the judge of the circuit court of Appomatox county an injunction restraining Johnson, the sergeant, from selling the property of the plaintiff and the collection of the tax in the bill mentioned until the further order of the court.

The plaintiff attacked the validity of the tax against him and the right to enforce its collection solely upon the ground that it was levied by virtue of the act of March 7, 1906, *supra,* and that said act is unconstitutional, null, and void, in that it is an independent act, and not passed in conformity with the provisions of section 52, article 4, of the Constitution of Virginia [Va. Code 1904, p. ccxxi], which provides that no law shall embrace more than one object, which shall be expressed in its title; nor shall any law be revived or amended with reference to its title, but the

act revived or section amended shall be re-enacted and published at length.

To his bill Beale, mayor, the six councilmen, and the sergeant of the town above mentioned, filed their joint answer, to which the plaintiff replied generally, which answer put in issue the constitutionality of the act of March 7, 1906, *supra,* and the validity of the tax levied against the plaintiff as above stated; and the cause coming on to be heard upon the bill and answer, affidavits filed in support of the averments of the answer, the record of the proceedings of the council, the certificates of the qualification by the mayor and members of the council, an agreed statement of facts, and a notice of a motion to dissolve the injunction theretofore awarded in the cause, the court, by its decree entered in vacation on the 21st day of March, 1907, held that the original charter of the town approved March 24, 1874, as amended by an act of the General Assembly approved March 31, 1875, had for a long time prior to the act of March 7, 1906, been disused, and at the time of the passage of said last-mentioned act, and for many years prior thereto there was no town government for said town of Pamplin City; that it appeared that the so-called town government, under which the tax complained of in the bill was levied, was organized under the act approved March 7, 1906; that the town of Pamplin City had no legal existence or authority whatever, unless it be by virtue of the act approved March 7, 1906; and that the said last-named act is void by reason of its being contrary to section 52, art. 4, of the Constitution of Virginia [Va. Code 1904, p. ccxxi], inasmuch as the act purports to amend the act of March 24, 1874, as amended by the act of March 31, 1875, by reference to its title alone, and in the enacting clause makes no reference whatever to the act which is referred to in the title, and does not purport to re-enact and publish at length the act as sought to be amended. Whereupon the motion to dissolve the injunction theretofore awarded in the cause was overruled. From this decree the defendants in the court below appealed to this court.

This court is of opinion that, for the reasons stated in the decree appealed from, the learned judge below was plainly right in holding the act of March 7, 1906, void. But we are further of opinion that it was error to hold that the town of Pamplin City had no legal existence or authority whatever to levy the tax complained of in the bill of appellee in this cause.

We have seen that the validity of the original charter of the town is not called in question, and that the organization of the government of the town was duly had under that charter; that a mayor and councilmen of the town were from time to time thereafter duly elected and qualified, pursuant to the provisions of the charter as amended by the act approved March 31, 1875, and

that these officers acted in their respective capacities for a number of years.

It seems to be well settled that a municipal corporation does not go out of existence for nonuser of is charter, or by a surrender of its franchise.

In 1 Dillon's Municipal Corporations, § 167, it is said: "Since all of our charters of incorporation come from the Legislature, a municipal corporation cannot dissolve itself by a surrender of its franchise. The state creates such corporations for public ends, and they will and must continue until the Legislature annuls or destroys them, or authorizes it to be done. If there could be such a thing as a surrender, it would, from necessity, have to be made to the Legislature, and its acceptance would have to be manifested by appropriate legislative action." In section 168 of the same work it is said: "The doctrine of a forfeiture of the right to be a corporation has also, it is believed by the author, no just or proper application to our municipal corporations. If they neglect to use powers in which the public or individuals have an interest, and the exercise of such powers be not discretionary, the courts will interfere and compel them to do their duty. On the other hand, acts done beyond the powers granted are void. If private rights are threatened or invaded, the courts will, as hereafter shown, restrain or redress the injury. * * * In short, unless otherwise specially provided by the Legislature, the nature and constitution of our municipal corporations, as well as the purposes they are created to subserve, are such that they can, in the author's judgment, only be dissolved by the Legislature, or pursuant to legislative enactment. They may become inert or dormant, or their functions may be suspended, for want of officers or of inhabitants; but dissolved, when created by an act of the Legislature and once in existence, they cannot be by reason of any default or abuse of the power conferred, either on the part of the officers or inhabitants of the incorporated place. As they can exist only by legislative sanction, so they cannot be dissolved or cease to exist except by legislative consent or pursuant to legislative provision."

In 1 Beach on Pub. Corporations, § 118, the learned author declares that "the power to dissolve a municipal corporation is vested wholly and exclusively in the legislative branch of our government." And in section 119 he says: "The American municipal corporation is simply and purely a strictly public corporation. It is a corporation of citizens, for citizens, and by citizens. Its sole object is local government. Being maintained, therefore, only for the public advantage, it is manifestly unjust, and even impossible, that the charters of our municipal corporations should be forfeited by judicial proceedings. To give such a power to the judiciary would be to make them co-ordinate with

the Legislature in their control of local government and local legislation. The illegal acts of municipal officials can be avoided and enjoined by various methods of judicial procedure; but the charter itself, being the creature of the Legislature, can be destroyed only by the same power that created. We have seen that the power of the Legislature over municipal charters is unlimited, except by constitutional limitations and by the power of the ballot box. We may further add that this power of control has no rival, and that neither the judicial nor the executive departments of our government can create or destroy a municipality, which is a subdivision of the state government. There are to the knowledge of the writer no cases in which this exclusive control of the Legislature has been successfully questioned." In support of this statement of the law a number of authorities are cited, among others 1 Dillon on Munic. Corp. § 168, *supra*.

In 20 Am. & Eng. Ency. of L. (2d Ed.) p. 1236, under the head of "Nonuser or Misuser of Franchises—Failure to Elect Officers, Etc.," it is said: "The general rule is undoubted that a municipal corporation is not *ipso facto* dissolved by a nonuser or misuser of its franchises, or a failure to elect officers. It has been held, indeed, that nonuser or misuser of the franchises of a municipal corporation is not even ground for a decree of dissolution by the courts but the contrary has also been declared." In support of the law as thus stated a number of decided cases are cited.

It is true that the original charter of the town of Pamplin City provides that the council shall consist of only five persons, and that the council should elect one of their number president, who should be mayor and be vested with all the powers of a justice of the peace within the limits of the town; but section 117 of the present Constitution of Virginia provides that "each of the cities and towns having at the time of the adoption of this Constitution a municipal charter, may retain the same, except so far as the same shall be repealed or amended by the General Assembly; provided that every such charter is hereby amended so as to conform to all the provisions, restrictions, limitations and powers as set forth in this article, or otherwise provided in this Constitution." And by section 1 of the schedule of the new Constitution it is provided that "the common and statute laws in force at the time this Constitution goes into effect, so far as not repugnant thereto or repealed thereby, shall remain in force until they expire by their own limitation or are altered or repealed by the General Assembly." The general law passed in pursuance of the new Constitution for the government of cities and towns is found in chapter 44 of the Code of 1904; and § 1021, a part of that chapter, provides that in every town there

shall be elected every two years, on the second Tuesday in June, a mayor and six councilmen, and that the mayor and councilmen shall constitute the council of the town.

It is clear, therefore, that by section 117, art. 8, of the Constitution [Va. Code 1904, p. ccxxxviii], the act of March 24, 1874, incorporating the town of Pamplin City, as amended by the act of March 31, 1875, was amended so as to conform to the new Constitution; and "section 117 is self-executing so far as it * * * amends the charters of towns and cities, so as to make them conform to the provisions of the Constitution." Hicks *v.* Bristol, 102 Va. 861, 47 S. E. 1001; Campbell *v.* Bryant, 104 Va. 509, 52 S. E. 638.

The mayor and council of the town of Pamplin City, appellants here, having been duly elected and qualified in conformity with the provisions of the general law for the government of cities and towns in the commonwealth, are the duly and legally constituted government of the town until their successors be duly elected and qualified, and under the original charter of the town, as amended as before stated, the council is clothed with power to levy taxes within the limits prescribed in the charter. Therefore the tax here complained of, so far as this record discloses, is within the limits of the power of the council to levy, legal and valid, and its collection should not have been enjoined.

For the foregoing reasons, the decree appealed from must be reversed and annulled; and this court will enter such decree as the circuit court should have entered, dissolving the injunction awarded in the cause, with costs to appellants.

DOUGLAS LAND CO. *v.* THAYER CO.

Sept. 12, 1907.

[58 S. E. 1101.]

1. Boundaries—Evidence—Documentary Evidence.—Where, in partition, several tracts were allotted to the parties, and the deeds to them called for the lines of designated patents, the patents were relevant evidence on the issue of the boundary line between the tracts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Boundaries, § 160.]

2. Same—Acts of Parties—Evidence—Admissibility.—Where, in a suit involving the boundary line between plaintiff's and defendant's lands, it appeared that an agent of defendant, while endeavoring to determine the true line, adopted a corner and marked timber to identify it, proof that a third person, who owned land adjoining the land of defendant, pointed out to the agent the corner, was admissible in